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# Treaty-Making between Public Authority and Private Interests: The Genealogy of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards

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## Abstract

*The bulk of the literature on transnational governance focuses on the bottom-up emergence of private rules, neglecting top-down processes such as treaty making. This article seeks to remedy this gap, using original archival material to show how a transnational network of experts associated with the International Chamber of Commerce influenced the negotiations of the United Nations Conference on the Recognition and Enforcement of Foreign Arbitral Awards (1958) and its final content. In doing so, this article will analyse the ways in which the complex allegiances developed within the International Chamber of Commerce enabled it to match public authority and private interests in a transnational legal process where states no longer held a monopoly.*

Transnational situations, then, may involve individuals, corporations, states, organizations of states, or other groups. A private American citizen, or a stateless person for that matter, whose passport or other travel document is challenged at a European frontier confronts a transnational situation. ... Equally one could mention the International Chamber of Commerce exercising its privilege of taking part in a conference called by the Economic and Social Council of the United Nations.

– Philip C. Jessup, *Transnational Law*

International commercial arbitration is commonly seen as a paradigm of a global phenomenon that is non-hierarchical, self-regulated and transnational.<sup>1</sup> One of its cornerstones<sup>2</sup> is the United

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<sup>1</sup> See, e.g., E. Gaillard, *Legal Theory of International Arbitration* (2010).

Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), an international treaty that limits the grounds upon which a losing party can resist enforcement of an arbitral award before national courts.<sup>3</sup> In particular, the courts of the 156 state parties to the New York Convention cannot review arbitral awards in enforcement proceedings, except on the grounds listed under its Article V.<sup>4</sup>

The New York Convention was signed two years after Philip Jessup coined the phrase ‘transnational law’ in his Storrs Lectures at Yale University.<sup>5</sup> This phrase was meant to designate legal situations that arise beyond nation states but do not wholly fit into traditional legal categories. Jessup particularly sought to address the weaknesses of international law theory by challenging the traditional approach, in which international lawyers downplay the influence of private interests in international governance and prefer emphasizing the pre-eminence of states in this process. As Janet Koven Levit points out, ‘international legal scholars have largely overlooked bottom-up lawmaking in favour of more traditional top-down stories’.<sup>6</sup>

Reacting against this tendency, however, legal scholars have increasingly paid attention to the rise of bottom-up law-making in recent years, focusing on the emergence of non-state rules arising from usage, guidelines, or general standards. For instance, some authors have highlighted with great relevance the birth of ‘islands of transnational governance’ through international arbitration,<sup>7</sup> while others have shown how private standards increasingly regulate international finance.<sup>8</sup> However, most authors have neglected to analyse and illustrate how Jessup’s analysis

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<sup>2</sup> See, e.g., A.J. van den Berg, *The New York Arbitration Convention of 1958* (1981); Reisman and Richardson, ‘The Present – Commercial Arbitration as a Transnational System of Justice: Tribunals and Courts: An Interpretation of the Architecture of International Commercial Arbitration’, in A.J. van den Berg (ed.), *Arbitration: The Next Fifty Years* (2012) 17.

<sup>3</sup> See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 1958, 330 UNTS 3. On the New York Convention, see Contini, ‘International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards’, 8 *American Journal of Comparative Law* (1959) 283; Sultan, ‘The United Nations Arbitration Convention and United States Policy’, 53 *American Journal of International Law* (1959) 808.

<sup>4</sup> *Ibid.*, Art. V.2(b).

<sup>5</sup> P. Jessup, *Transnational Law* (1956). On the lasting influence of Jessup’s work on the theory of transnational law, see Zumbansen, ‘Transnational Law’, in J. Smits (ed.), *Encyclopedia of Comparative Law* (2006) 738.

<sup>6</sup> Koven Levit, ‘A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments’, 30 *Yale Journal of International Law* (2005) 125, at 173.

<sup>7</sup> Stone Sweet, ‘Islands of Transnational Governance’, in M. Shapiro and A. Stone Sweet (eds), *On Law, Politics and Judicialization* (2002) 323; see also Y. Dezalay and B.G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (1996).

<sup>8</sup> T. Buthe and W. Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy* (2011).

might also apply to traditional top-down processes such as treaty making.<sup>9</sup> The present article seeks to fill this gap in the literature by focusing on the genealogy of the New York Convention.

The notions of transnational legal process and transnational legal networks will serve as guidelines for our study of the New York Convention. The notion of a transnational legal process has been defined as the ‘theory and practice of how public and private actors – nation-states, international organizations, multinational enterprises, non-governmental organizations, and private individuals – interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law’.<sup>10</sup> Because of their multi-faceted nature, transnational legal processes are the ideal place for transnational legal networks to unfold and operate. These networks are composed of individuals or entities whose allegiances – public or private, national or international – are unclear and who ultimately cross traditional boundaries in order to bypass embedded social and power structures.<sup>11</sup>

Against this backdrop, the present study will show how private interests heavily influenced the negotiations leading to the New York Convention. These negotiations have been partly documented in the past, but authors have missed – or ignored – a significant portion of the available archives that relate to private interests.<sup>12</sup> This article utilizes the *travaux préparatoires* of the New York Convention as well as the relevant archives of the United Nations (UN) and the French Ministry of Foreign Affairs in order to reveal a previously unknown story relating to the genesis of the New York Convention and the diplomatic conference that took place under the aegis of the UN in New York from 20 May to 10 June 1958 (the UN Conference). On the basis of this archival material, it will be argued that private interests *de facto* acted in a strategic, coordinated manner during the genesis of the New York Convention and achieved what had been rejected as provocative by national governments shortly before. The key character in this story is the ICC, a private institution headquartered in Paris and particularly active in the field of international commercial arbitration. The key moment is a meeting of private interests and public authority that occurred during the UN Conference on 26 May 1958. Three main themes emerge

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<sup>9</sup> See, however, S.K. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (2003).

<sup>10</sup> Hongju Koh, ‘Transnational Legal Process’, 75 *Nebraska Law Review* (1996) 181, at 183–184.

<sup>11</sup> See in this regard Halliday and Shaffer, ‘Transnational Legal Orders’, in T.C. Halliday and G. Shaffer (eds), *Transnational Legal Orders* (2015) 3.

<sup>12</sup> See, e.g., C. Tsai, ‘La Chambre de Commerce Internationale – Un Groupe de Pression International, Son Action et Son Rôle dans l’Elaboration, la Conclusion et l’Application des Conventions Internationales Etablies au Sein des Organisations Intergouvernementales à Vocation Mondiale, 1945–1969’ (PhD dissertation, Université Catholique de Louvain, 1972, on file with Bibliothèque Nationale de France).

from our analysis: the transnational character of the ICC, its pre-eminent role during the genesis of the New York Convention and the support provided to it by a transnational network of experts during the UN Conference.

## **1 The ICC: The Archetype of a Transnational Institution**

The ICC was created in the aftermath of World War I, and its formal organization did not wholly fit traditional separations between ‘public’ and ‘private’, ‘national’ and ‘international’. Indeed, the ICC has combined private and public elements in order to pursue its global mission. The primary purpose of the ICC has been to promote global peace by private means; its founders described themselves as ‘merchants of peace’,<sup>13</sup> and the ICC characterized itself as a ‘private institution for public welfare’.<sup>14</sup> In its current constitution, the ICC still refers to ‘greater global prosperity and peace among nations’ as its ‘fundamental objective’.<sup>15</sup> In addition, the ICC, whose formal legal status is a local association under French law (*Association loi de 1901*), also federates an international network of national committees composed of prominent business representatives in every member country.<sup>16</sup> These national committees act as local missions for the ICC and, to that end, maintain close relationships with trade associations, unions and national governments. The number of these national committees has grown from 20 in 1924,<sup>17</sup> to 32 in 1935,<sup>18</sup> to 90 in 2015.<sup>19</sup> The ICC is therefore a local entity that spans several countries based on a loose network of national committees.

As part of its efforts to promote peace, the ICC quickly turned towards arbitration as an effective means to solve international business disputes. In 1923, the ICC created a Court of Arbitration composed of eight to ten business experts for each country member.<sup>20</sup> This Court of Arbitration does not settle business disputes by itself but, rather, supervises and administers the

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<sup>13</sup> See, e.g., G.L. Ridgeway, *Merchants of Peace: Twenty Years of Business Diplomacy through the International Chamber of Commerce 1919–1938* (1938).

<sup>14</sup> International Chamber of Commerce (ICC), *International Commercial Arbitration: Commercial Hints* (1935), at 7.

<sup>15</sup> ICC Constitution, June 2012, available at [www.iccwbo.org/constitution/](http://www.iccwbo.org/constitution/) (last visited 14 May 2015).

<sup>16</sup> On the history and organization of the ICC, see G.L. Ridgeway, *Merchants of Peace: Twenty Years of Business Diplomacy through the International Chamber of Commerce 1919–1938* (1938).

<sup>17</sup> ICC, *The Arbitration of the International Chamber of Commerce* (1924), at 11–12.

<sup>18</sup> ICC, *supra* note 14, at 13.

<sup>19</sup> ICC, ‘National Committees and Groups’, available at [www.iccwbo.org/about-icc/organization/national-committees-and-groups/](http://www.iccwbo.org/about-icc/organization/national-committees-and-groups/) (last visited 15 May 2015).

<sup>20</sup> ICC, *supra* note 17, at 6.

arbitral process.<sup>21</sup> For instance, the ICC Court of Arbitration appoints arbitrators and fixes time limits within which arbitral awards shall be rendered.<sup>22</sup> The ICC has progressively become the central organization in this field, and its caseload has steadily expanded throughout the 20th century.

The ICC has also become the platform through which a unique network of arbitration experts meet, discuss objectives and calculate strategic options. For instance, the ICC Committee on International Commercial Arbitration (also named the Commission on International Commercial Arbitration or the Commission on International Arbitration), which was created in 1921, gathers arbitration experts who have developed a powerful, forward-looking strategy for the development of arbitration in general. Finally, the ICC became the first non-governmental organization to obtain general consultative status at the UN Economic and Social Council (ECOSOC) in 1946.<sup>23</sup> As will be seen below, the consultative status of the ICC and the transnational network of experts gathered around its Committee on International Commercial Arbitration played an instrumental role in the genesis of the New York Convention.

## **2 The Role of the ICC in the Genesis of the New York Convention**

### ***A The ICC Preliminary Draft Convention (1953)***

After World War II, the ICC encouraged the creation of a new regime for the enforcement of arbitral awards. Until then, the main legal instrument supporting the enforcement of arbitral awards at the international level had been the Convention on the Execution of Foreign Arbitral Awards (Geneva Convention), which suffered from two main shortcomings.<sup>24</sup> The first arose from the impossibility of enforcing an award that had not become ‘final in the country in which it has been made’.<sup>25</sup> Hence, a party who wished to enforce an award had to establish that the award was final in the country where it had been rendered, which necessitated double *exequatur*

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<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*, at 6–7.

<sup>23</sup> United Nations Economic and Social Council (ECOSOC), List of Non-Governmental Organizations in Consultative Status with the Economic and Social Council as of 1 September 2013, UN Doc. E/2013/INF/6, 4 October 2013. On the international activities of the ICC, see Haight, ‘Activities of the International Chamber of Commerce and Other Business Groups’, 54 *American Society of International Law Proceedings* (1960) 200.

<sup>24</sup> See Convention on the Execution of Foreign Arbitral Awards (Geneva Convention) 1927, 92 LNTS 310.

<sup>25</sup> *Ibid.*, Art. 1(d).

proceedings. These proceedings were initiated both at the seat of the arbitration (in order to make sure that the award was indeed final) and at the place of enforcement (in order to enforce the award and seize assets located in a country other than the place of arbitration), significantly lengthening the time involved in the process.<sup>26</sup>

The second shortcoming of the Geneva Convention arose from the obligation for an award to conform to the ‘law governing the arbitration procedure’ in order to be enforceable, which undermined the autonomy of arbitral awards in the context of national legal systems.<sup>27</sup> In order to create a new framework for the enforcement of arbitral awards, the ICC first explored the possibility of drafting ‘an international uniform legislation aimed at simplifying recourse to arbitration’, as discussed at its Quebec Congress, held in 1949.<sup>28</sup> The ultimate goal was to create uniform conditions for the enforcement of arbitral awards by issuing a model law (instead of promoting uniformity through an international treaty). As emphasized by the ICC during the Quebec Congress, ‘[a]s long as the laws governing arbitration vary from one country to another, there will be uncertainty as to the validity of arbitration clauses and the possibility of enforcing arbitral awards in a foreign country’.<sup>29</sup>

For this reason, the ICC worked in coordination with the International Institute for the Unification of Private Law, which in the late 1930s prepared a draft Uniform Law on Arbitration in Respect of International Relations of Private Law, aimed at unifying the grounds for the enforcement of arbitral awards across national systems.<sup>30</sup> However, the ICC progressively came to the conclusion that this draft Uniform Law was impracticable since it would require the modification of a large number of national laws in order to be effective.<sup>31</sup> The ICC therefore explored other options (as noted in two reports discussed at the ICC Commission on International Commercial Arbitration in May 1950).<sup>32</sup> One particular option explored by the ICC was the adoption of ‘an international convention stipulating that all signatory countries enforce an

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<sup>26</sup> See E. Gaillard and J. Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (1999), at 122.

<sup>27</sup> Geneva Convention, *supra* note 24, at Art. 1(c).

<sup>28</sup> ICC, Resolutions Adopted by the Twelfth Congress of the International Chamber of Commerce, Quebec, 13–17 June 1949 (1949), at 85.

<sup>29</sup> *Ibid.*

<sup>30</sup> See Preliminary Draft of a Uniform Law on Arbitration in Respect of International Relations of Private Law (Preliminary Draft Convention), reprinted in International Institute for the Unification of Private Law (ed.), *Unification of Law: A General Survey of Work for the Unification of Private Law: Drafts and Convention* (1948) 187.

<sup>31</sup> 12<sup>th</sup> May – Committee on Arbitration Law, World Trade, June 1950, at 7–8.

<sup>32</sup> *Ibid.*

international commercial award properly certified ... as though it were a judgment of that court'.<sup>33</sup> In June 1951, at its Lisbon Congress, the ICC accordingly adopted a resolution calling states to amend or replace the Geneva Convention:

The I.C.C. welcomes a continuation of studies for the unification of arbitration laws in all countries, on the basis of the draft proposed by the International Institute for the Unification of Private Law, but recognizes the complexities and difficulties of the subject. The I.C.C. considers that pending completion of these studies an immediate effort should be made (whether by amendment of the Geneva Convention of 1927 or by a new Convention) to remove the main defect which militates against the effectiveness of international arbitration and to permit the immediate enforcement of international arbitral awards. The I.C.C. calls on all governments concerned to cooperate towards that end.<sup>34</sup>

Attached to the ICC resolution was a report entitled International Commercial Arbitration and Freedom of Contract, submitted by Edwin S. Herbert on behalf of the ICC Commission on International Commercial Arbitration,<sup>35</sup> which contained an in-depth criticism of the Geneva Convention. In particular, the ICC criticized the issue mentioned above, which arose from the 'reference in the Convention to the law of the country'.<sup>36</sup> The ICC recommended in its preliminary draft that the award should be rendered in accordance with the procedural rules agreed upon by the parties (as opposed to the procedural rules arising from a national law) in order to be enforceable.<sup>37</sup> The goal was to ensure the autonomy of the arbitral process in regard to national laws. This second line of criticism was, as we will see, a powerful force behind the adoption of the New York Convention.

Following this resolution, the ICC gathered a sub-committee chaired by Jean Robert, a prominent member of its Court of Arbitration, in order to design a 'draft convention on the execution and enforcement of international awards'.<sup>38</sup> Along with its chairman, two members of this sub-committee turned out to be particularly important for the fate of the New York

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<sup>33</sup> *Ibid.*

<sup>34</sup> ICC, *International Commercial Arbitration and Freedom of Contract* (1951), at 6.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*, at 7.

<sup>37</sup> *Ibid.*, at 8.

<sup>38</sup> The members of this sub-committee were: Jean Robert (Chairman), René Arnaud, Ernest Barda, Charles Carabiber, Robert Marx, James Mordan, Pieter Sanders and Max Shoop.



Convention: René Arnaud and Pieter Sanders. René Arnaud was a French citizen who joined the newly created ICC in 1920 and attained the position of Secretary General of the French National Committee in 1933.<sup>39</sup> Pieter Sanders was a Dutch citizen, who founded the Nederlands Arbitrage Instituut in Rotterdam after World War II and co-edited a specialized review in the field of arbitration (*Arbitrale Rechtspraak*).<sup>40</sup> He also acted as arbitrator in the ICC proceedings<sup>41</sup> and became a member of the ICC Commission on International Commercial Arbitration in 1949.<sup>42</sup> His name gained prominence with the New York Convention, and he was later dubbed its ‘father’. In reality, Pieter Sanders’ contribution to the New York Convention cannot be isolated from the transnational network of experts to which he belonged, as will be seen further later in this article.

The Preliminary Draft Convention was finalized and adopted by the ICC Committee on International Commercial Arbitration in March 1953.<sup>43</sup> In this draft, the ICC sought to address the two main shortcomings of the Geneva Convention. First, the ICC deleted the reference to the ‘final’ character of the award as a condition for its enforceability. The goal of this deletion was to defeat double *exequatur* proceedings.<sup>44</sup> Second, Article III(b) of the ICC Preliminary Draft provided that the arbitral procedure should be conducted ‘in accordance with the agreement of the parties or, *failing agreement between the parties in this respect*, in accordance with the law of the country where arbitration took place’.<sup>45</sup> This language aimed at giving priority to the parties’ agreement (over the law of the place of arbitration). In this regard, the ICC also promoted, through its Preliminary Draft Convention, the idea of an international award arising out of the autonomy of the parties’ will and independent from domestic laws.

### ***B A Backlash from States at the UN: The ECOSOC Draft (1955)***

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<sup>39</sup> ICC, *Un Demi-Siècle au Service de la Chambre de commerce Internationale* (1969).

<sup>40</sup> For a summary of Sanders’ career, see Sandrock, ‘For Pieter Sanders’ 100<sup>th</sup> Birthday: European company – New York Convention – UNCITRAL’, 111 *Zeitschrift für Vergleichende Rechtswissenschaft* (2012) 259.

<sup>41</sup> See, e.g., the ICC award rendered by Pieter Sanders as sole arbitrator in March 1951. *D. v. A.*, Award of 6 March 1951, reprinted in 365 *Arbitrale Rechtspraak* (1951) 508.

<sup>42</sup> Sandrock, *supra* note 40.

<sup>43</sup> ICC, *Enforcement of International Arbitral Awards: Report and Preliminary Draft Convention Adopted by the Committee on International Commercial Arbitration at Its Meeting of 13th March 1953* (1953).

<sup>44</sup> *Ibid.*, at 11.

<sup>45</sup> *Ibid.*, at 13 (emphasis added).

The ICC submitted the Preliminary Draft Convention to the UN in October 1953.<sup>46</sup> In October 1954, ECOSOC appointed a committee composed of delegates of eight countries to review the ICC Preliminary Draft Convention.<sup>47</sup> None of the state delegates at the ECOSOC Committee were experts in the field of international arbitration save for Benjamin Wortley, the representative of the United Kingdom.<sup>48</sup> In March 1955, the ECOSOC Committee met for two weeks.<sup>49</sup> During these meetings, the state representatives expressed their strong disagreement with the ICC Preliminary Draft, notably with the notion of ‘international award’. As a consequence, with one abstention, the Committee unanimously adopted its own draft convention.<sup>50</sup>

This draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards (ECOSOC Draft) (and not international arbitral awards as the ICC had wished) reintroduced finality as a condition for the enforceability of an award under its Article III(b).<sup>51</sup> The explanatory note to the ECOSOC Draft justified this move away from the ICC Preliminary Draft Convention by asserting the need to protect the losing party:

The ICC Draft had omitted from the conditions of enforcement the condition that an arbitral award must be final. In order to properly safeguard the rights of the losing party, the Committee decided to reintroduce the requirement of finality which had been included in the Geneva Convention (Article 1(d)). This provision prescribes that in the country where the award was made, the award must be ‘final and operative’ and in particular, that its enforcement must not have been suspended. The expression ‘final and operative’ was intended by the Committee to mean that an award must be a definitive adjudication of all matters at issue, and must have full legal force and effect.<sup>52</sup>

In addition, the ECOSOC Draft modified the language of the ICC Preliminary Draft Convention concerning the rules applicable to the arbitral procedure. Its Article IV(g) introduced a hierarchy

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<sup>46</sup> ECOSOC, Statement Submitted by the International Chamber of Commerce, a Non-Governmental Organization Having Consultative Status in Category A, UN Doc. E/C.2/273/Add.1, 25 February 1954.

<sup>47</sup> See *Nouvelles de la CCI*, October 1954, at 1. These countries were Australia, Belgium, Egypt, Ecuador, India, United Kingdom, Sweden and the Soviet Union.

<sup>48</sup> ECOSOC, Report of the Committee on the Enforcement of International Arbitral Awards, UN Doc. E/2704, 28 March 1955, at 2.

<sup>49</sup> See *Nouvelles de la CCI*, April 1955, at 1.

<sup>50</sup> ECOSOC, *supra* note 48, at 5.

<sup>51</sup> *Ibid.*, at 1, Annex: ‘To obtain the recognition and enforcement mentioned in the precedent article it will be necessary that in the country where the award was made, *the award has become final and operative*, and in particular, that its enforcement has not been suspended’ (emphasis added).

<sup>52</sup> *Ibid.*, at 9.

between the law of the place of arbitration and the procedural laws agreed on by the parties, in favour of the former law.<sup>53</sup>

The combined effect of Articles III(b) and IV(g) of the ECOSOC Draft was to reintroduce the two main shortcomings of the Geneva Convention, namely the risk of double *exequatur* and the lack of autonomy of the arbitration procedure towards domestic laws. The ECOSOC Draft therefore departed from the direction set by the ICC Preliminary Draft Convention and marked an attempt by the states to keep tight control over international commercial arbitration. As a consequence, the ICC faced the following choice with respect to the ECOSOC Draft: it could either express its disagreement with the ECOSOC Draft and continue to support its own preliminary draft convention, or it could choose to support the ECOSOC Draft and propose amendments thereto.

### ***C The Diplomatic Path Chosen by the ICC: Amendments to the ECOSOC Draft (1958)***

From October until December 1957, the ICC initiated discussions within its Commission on International Arbitration on the best strategy to adopt in this regard. Two main positions emerged from these discussions. Some members of the ICC Commission on International Arbitration leaned towards a diplomatic position. Pieter Sanders, for example, expressed the view that he ‘did not see any possibility ... of going further than the Draft of the ECOSOC’ and that he ‘did not think it at all advisable to propose amendments exceeding the scope of this Draft, which was much more limited than the draft of the ICC’.<sup>54</sup> Other members advocated for a more aggressive position. Jean Robert, for example, advised that the substance of the ICC Preliminary Draft Convention should be preserved, with the ECOSOC Draft being kept as a basis for negotiations.<sup>55</sup>

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<sup>53</sup> *Ibid.*, at 2, Annex: ‘[E]ither the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties *to the extent that such agreement was lawful in the country where the arbitration took place*, or, failing such agreement between the parties in this respect, was not in accordance with the law of the country where the arbitration took place’ (emphasis added).

<sup>54</sup> Summary Record of the Meeting of Oct. 10, 1957 of the ICC Commission on International Arbitration and Commercial Law (Summary Record), ICC Doc. 420/84, 18 December 1957 (on file with the United Nations [UN] Archives).

<sup>55</sup> *Ibid.*

The UN occasionally intervened in these debates and lobbied in favour of the first position.<sup>56</sup> In a report sent to the UN headquarters, a UN official emphasized that the ICC should take into account the strong governmental opposition to the ICC Preliminary Draft Convention:

I intervened to suggest, in a purely personal capacity, that if the ICC come to the New York Conference to insist upon its original draft and to oppose the ECOSOC draft as a whole there would be a serious risk of the whole idea of a new convention running into heavy water since it was patent that governmental opinion was hostile to certain aspects of the ICC draft, such as the concept of an ‘international award’ which may be regarded as a purely doctrinal and academic approach to the problem of the enforcement of arbitral awards.<sup>57</sup>

However, the more aggressive position eventually prevailed at the ICC. In October 1957, the ICC Committee on International Arbitration – through its Chairman Edwin S. Herbert – decided that it would lay out amendment proposals to the ECOSOC Draft and push for the positions set out by the ICC in its Preliminary Draft Convention:

The CHAIRMAN [Herbert], in resuming the general discussion, thought that they were unanimously agreed on the goal at which the ICC should aim, but not on the method for attaining it, in view of the fact that the Conference might pronounce in favour of the ECOSOC Draft. He therefore proposed that the Working Party’s document expounding the ICC’s views should be redrafted so as to (1) explain the reasons why the ICC continued to refer to reforms it had itself suggested; (2) suggest the possibility of deciding in favour of the ECOSOC Draft, saying what progress might be possible in this case; (3) set forth the amendments which, in the opinion of the ICC, would be necessary if the ECOSOC Draft was to be effective in the more limited field it was designed to cover.<sup>58</sup>

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<sup>56</sup> For instance, in a letter dated 3 April 1957, the director of the General Legal Division at the UN (Oscar Schachter) thanked a UN legal advisor (Lazare Kopelmanas) for indicating to the ICC that ‘[Kopelmanas] considered their idea of international arbitral awards theoretical and their proposal as to severance of arbitral awards from the national law as not practical enough’ (Letter from Oscar Schachter, Director, General Legal Division, Legal Department, United Nations, to Lazare Kopelmanas, Legal Adviser, United Nations Economic Commission for Europe, 3 April 1957 (on file with the UN Archives)). At a meeting held in October 1957, a UN official urged the ICC to compromise its position and support the ECOSOC Draft.

<sup>57</sup> Letter from André Tunc, Legal Adviser, Economic Commission for Europe, to Oscar Schachter, Director, General Legal Division, United Nations, 22 October 1957, enclosing the report from the European Commission for Europe on a meeting held by the ICC Commission on International Arbitration and Commercial Law on 9–11 October 1957, at 5 (on file with the UN Archives).

<sup>58</sup> Summary Record, *supra* note 54.

It is noteworthy that Pieter Sanders eventually endorsed the strategy recommended by the ICC (as will be seen further below), despite having previously expressed his opposition to making ‘amendments exceeding the scope of th[e] [ECOSOC] draft’.<sup>59</sup>

Following these meetings, the ICC released its proposed amendments to the ECOSOC Draft in a special issue of its gazette, published in April 1958,<sup>60</sup> which was distributed at the outset of the UN Conference.<sup>61</sup> In these proposed amendments, the ICC accepted the terminology of ‘foreign’ awards (instead of ‘international’ awards) and focused its criticisms on two provisions of the ECOSOC Draft, namely its Articles III(b) and IV(g). As noted above, Article III(b) was the most controversial provision of the ECOSOC Draft since it reintroduced the possibility of double *exequatur*. The ICC did not argue for its full deletion but, rather, adopted a middle course, recommending that the finality of the award become a negative ground for the losing party to resist enforcement rather than a positive condition for the winning party to obtain enforcement of the award.<sup>62</sup>

Another criticism from the ICC concerned Article IV(g) of the ECOSOC Draft. The ICC criticized the reference made in this article to the lawfulness of the parties’ agreement regarding the ‘composition of the arbitral authority or the arbitral procedure’ under the law of the country where the arbitration took place. According to the ICC, this language would allow the losing party to engage in dilatory tactics before the domestic courts at the seat of the arbitration and accordingly recommended its deletion.<sup>63</sup> It therefore appears that the ICC softened its initial position by accepting the ECOSOC Draft as a basis for the negotiations. However, the amendments proposed by the ICC in April 1958 sought to address the two main shortcomings of the Geneva Convention. As will be seen below, these two proposed amendments were eventually adopted at the UN Conference and strongly influenced the eventual shape of the New York Convention.

### 3 A Transnational Network of Experts and the Unfolding of the UN Conference

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<sup>59</sup> *Ibid.*

<sup>60</sup> *Nouvelles de la CCI*, Special Issue, April 1958.

<sup>61</sup> *Nouvelles de la CCI*, May–June 1958, at 1.

<sup>62</sup> In other words, the winning party seeking enforcement of an award would not have to prove that this award was final. Instead, the losing party would have to prove that the award was *not* final in order to successfully resist enforcement. See *Nouvelles de la CCI*, Special Issue, *supra* note 60, at 3.

<sup>63</sup> *Ibid.*, at 3–4.

The standard account of the UN Conference, which took place from 20 May until 10 June 1958, highlights the key role played by Pieter Sanders in the elaboration of the New York Convention.<sup>64</sup> According to this account, on 26 May 1958, Sanders introduced a new text as a basis for negotiations (in lieu of the ECOSOC Draft) on behalf of the Netherlands. The mythology of the New York Convention relates that Sanders drafted his proposal on a portable Hammond typewriter while sitting in his father-in-law's garden in a New York suburb at the end of the first week of the UN Conference and presented it at the beginning of the second week, thus preventing the conference from running aground.<sup>65</sup>

The interpretation of events proposed in this article differs in three regards. First, Sanders was not the solitary white knight often praised in the arbitration circles but, rather, the acting soldier of an invisible network of experts, with an exact understanding of how the debate had previously developed at the ICC. Second, Sanders' strategic initiative can be interpreted as a reflection of the view that, after governments had rejected the 1953 ICC Preliminary Draft, they had no vision of the way ahead. Third, a close reading of the New York Convention shows that this text was in fact much closer to the position of the ICC than is usually assumed.<sup>66</sup>

### *A A Transnational Network of Experts Gathered around the ICC*

Beyond the negotiations that were playing out at the UN Conference in New York, another game was underway between transnational experts whose bonds and allegiances were more complex and less visible. The ICC sent a team of five delegates, led by Edwin Herbert (the chairman of the ICC Commission on International Commercial Arbitration), to attend the conference. Frédéric Eisemann, the Secretary General of the ICC, was also part of the ICC delegation.<sup>67</sup> However, these delegates did not have the power to amend or vote on the ECOSOC Draft as they represented a consultative organization and not a state.

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<sup>64</sup> See Sandrock, *supra* note 40; M.R.P. Paulsson, *The 1958 New York Convention in Action* (2016), at 5–6.

<sup>65</sup> *Ibid.*

<sup>66</sup> See, e.g., Briner and Hamilton, 'The Creation of an International Standard to Ensure the Effectiveness of Arbitration Agreements and Foreign Arbitral Awards', in E. Gaillard and D. di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (2008) 3.

<sup>67</sup> See G.W. Haight, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Summary Analysis of Record of United Nations Conference May-June 1958* (1958), at 107.

At the same time, some state delegates, who did have the power to amend or vote, belonged to the same network of experts as the ICC delegates. Among these state delegates were René Arnaud, representing France, and Sanders, representing the Netherlands.<sup>68</sup> As noted above, both men had been closely involved in the elaboration of the ICC Preliminary Draft and had attended several meetings at the ICC in anticipation of the UN Conference. Other state delegates belonged to the same transnational network of experts as Arnaud and Sanders,<sup>69</sup> including Ottoarndt Glossner (Germany), Benjamin Wortley (United Kingdom), Mario Matteucci and Eugenio Minoli (both from Italy).<sup>70</sup> All of these experts knew each other<sup>71</sup> and belonged to the same professional network.<sup>72</sup>

The case of René Arnaud is illustrative of the complex identity of these experts. Between 1954 and 1958, the ICC nurtured close relationships with the French Ministry of Foreign Affairs through Arnaud. For instance, Arnaud sent numerous letters to the ministry, communicating, for instance, the ICC Preliminary Draft Convention in 1954<sup>73</sup> and comments on the ECOSOC Draft in 1955.<sup>74</sup> In addition, the ICC held several meetings at the ministry during this time period. These meetings were generally organized by the French National Committee of the ICC, often by Arnaud himself. Through these contacts, the ICC lobbied the ministry in favour of its positions. When the ministry considered a potential delegate for France at the upcoming New York Conference, it suggested Arnaud. The appointment raised doubts within the French government,

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<sup>68</sup> *Ibid.*, at 105.

<sup>69</sup> See Glossner, 'From New York (1958) to Geneva (1961): A Veteran's Diary', in United Nations (UN) (ed.), *Enforcing Arbitration Awards under the New York Convention: Experience and Prospects* (1999–2000) 5, at 6.

<sup>70</sup> *Ibid.*

<sup>71</sup> The network was not only transnational but also grounded in mutual respect and admiration. For instance, one can find four members of the network (Benjamin Wortley, Eugenio Minoli, Ottoarndt Glossner and Frédéric Eisemann) among the authors of a *Festschrift* edited by Pieter Sanders in 1967 in honour of Martin Domke, another attendee at the UN Conference. In another *Festschrift* edited for Eugenio Minoli in 1974, two other members of the network (Frédéric Eisemann and Pieter Sanders), as well as Martin Domke, contributed chapters. Finally, two members of the network (Ottoarndt Glossner and Pieter Sanders) wrote chapters in a *Festschrift* published shortly thereafter in the honour of Frédéric Eisemann, and two other members (René Arnaud and Pierre-Jean Pointet) were listed among the subscribers.

<sup>72</sup> Glossner, for example, became the chairman of the ICC Commission on International Commercial Arbitration in 1960; Wortley sat on the committee that drafted the International Institute for the Unification of Private Law's (UNIDROIT) Uniform Law on Arbitration in Respect of International Relations of Private Law in 1940 and was part of the ECOSOC Committee in 1955; Matteucci was the Secretary General and later president of UNIDROIT, which issued the above-mentioned Uniform Law; and Minoli participated in the ICC Congress held in Naples in May 1957.

<sup>73</sup> See letter from René Arnaud, Director of the French National Committee of the ICC, to the French Minister of Foreign Affairs, 18 February 1954 (on file with the archives of the French Ministry of Foreign Affairs).

<sup>74</sup> See letter from René Arnaud, Director of the French National Committee of the ICC, to Vincent Boustra, Director of the Secretariat for Conferences, French Ministry of Foreign Affairs, 20 September 1955 (on file with the archives of the French Ministry of Foreign Affairs).

however, because the views developed by the ICC were potentially against French national interests. For instance, the French Ministry of Justice argued that the French delegate should be a high civil servant or a senior judge, rather than an ICC official, and suggested the appointment as delegate of a judge at the Cour de cassation, Georges Holleaux.<sup>75</sup> A compromise was eventually found, and both Holleaux and Arnaud ended up representing France at the UN Conference.<sup>76</sup> As an example of the overlap between private and public interests – perhaps anecdotal but nevertheless telling – the ICC paid the expenses incurred by Arnaud when he represented France at the UN Conference, while France paid for the expenses incurred by Holleaux.<sup>77</sup>

### ***B The Crystallization of Public and Private Interests through the ‘Dutch Proposal’ (27 May 1958)***

The influence of this network became clear when Sanders introduced his famous proposal during the UN Conference. The discussions based on the ECOSOC Draft were unsuccessful during the first week of the conference (from 20 May until 24 May 1958). Sanders himself recalled that ‘[on] all the real substantive matters, we hardly made any progress at all [during that first week]’.<sup>78</sup> In this context, Sanders introduced the new amendments as the ‘Dutch proposal’ on 26 May 1958.<sup>79</sup> Interestingly, the Dutch proposal was in line with the amendment proposals made by the ICC in April 1958. In particular, the Dutch proposal introduced the lack of ‘finality’ of the award as a negative condition to be proved by the losing party resisting enforcement.<sup>80</sup> The Dutch proposal also deleted the reference to the lawfulness of the parties’ agreement in the country where the arbitration took place under a new Article IV(c).<sup>81</sup>

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<sup>75</sup> See letter from the French Minister of Justice to the French Minister of Foreign Affairs, 23 April 1958 (courtesy translation) (on file with the archives of the French Ministry of Foreign Affairs).

<sup>76</sup> Georges Holleaux fell sick on 31 May 1958, and René Arnaud was the sole French delegate thereafter. See letter from René Arnaud, Director of the French National Committee of the ICC, to Jean du Boisberranger, French Ministry of Foreign Affairs, 10 June 1958 (on file with the archives of the French Ministry of Foreign Affairs).

<sup>77</sup> See note from the Direction of the United Nations and International Organizations, French Ministry of Foreign Affairs to the General Direction of Personnel, French Ministry of Foreign Affairs, 7 May 1958) (on file with the archives of the French Ministry of Foreign Affairs).

<sup>78</sup> Interview by the International Bar Association (Marlene de Wouters) with Pieter Sanders, in Schiedam, Netherlands (2007), available at [www.arbitration-icca.org/historic-treasures/profsanders.html](http://www.arbitration-icca.org/historic-treasures/profsanders.html) (last visited 18 May 2015).

<sup>79</sup> See Sanders, ‘The Making of the Convention’, in UN, *supra* note 70, 3.

<sup>80</sup> ECOSOC, *Netherlands: Amendments to the Draft Convention*, UN Doc. E/Conf.26/L.17, 26 May 1958.

<sup>81</sup> *Ibid.*



When Sanders introduced the Dutch proposal at the UN Conference on 26 May 1958, the reaction from the other participants was even more significant. The proposal met the immediate approval of the delegates from Italy (Mario Matteucci), France (Georges Holleaux) and the United Kingdom (Benjamin Wortley), who were joined by Switzerland (Pierre-Jean Pointet) and the ICC (George Haight).<sup>82</sup> All of these delegates praised the Dutch proposal in turn.<sup>83</sup> The delegates from Italy, the United Kingdom and the ICC suggested that the Dutch proposal should be used as a basis for negotiations (thus replacing the ECOSOC Draft).<sup>84</sup> The president of the conference, a Dutch national, then successfully called for a vote on whether the Dutch proposal should serve as a working basis for the UN Conference.<sup>85</sup>

### ***C The Influence of the ICC on the Final Text of the New York Convention***

The Dutch proposal had a tremendous impact on the fate of the ensuing negotiations. As pointed out above, the text proposed by Sanders replaced the ECOSOC Draft as the basis for negotiations among states. As a result of this diplomatic move, the final text of the New York Convention was very close in substance to the position laid down by the ICC in April 1958. For instance, Vladimir Fabry, a UN official who attended the UN Conference, noted in private correspondence that ‘[a]s a matter of fact, except for avoiding the term “international award”, [the UN Convention] goes in many respects even further than the original ICC draft’.<sup>86</sup>

More specifically, the final text of the New York Convention sought to address the two main shortcomings of the Geneva Convention. First, the final text followed the proposal made by the ICC in April 1958, as reflected in the Dutch proposal, according to which the losing party should prove that an award is not final in order to resist enforcement of this award (as opposed to the winning party proving that the award is final in order to obtain enforcement). The language of the New York Convention went even further than the Dutch proposal by replacing the word

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<sup>82</sup> ECOSOC, *Summary Record of the Eleventh Meeting*, UN Doc. E/Conf.26/Sr.11, 12 September 1958, at 5–12.

<sup>83</sup> *Ibid.*, at 7–12.

<sup>84</sup> *Ibid.*, at 5–12.

<sup>85</sup> *Ibid.*, at 13.

<sup>86</sup> ECOSOC, *supra* note 83, at 2. Eugenio Minoli, one of the Italian delegates, also commented that ‘the Conference decided in favour of a compromise undoubtedly nearer to the wishes of the ICC and of all those to whom arbitration appears to be an expression of legal regulation pertaining to the individual, rather than an institution coming under the legislation of the State.’ See Minoli, ‘The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards’, *Unification of Law Yearbook* (1958) 156, at 161.

‘final’ with the word ‘binding’ in Article V(1)(e).<sup>87</sup> Second, the reference to the lawfulness of the parties’ agreement under the law of the country where the arbitration took place was deleted from the final text of the New York Convention, reflecting almost literally the ICC Preliminary Draft Convention.<sup>88</sup>

Finally, the influence of the ICC can be seen in Article V(1)(b) of the New York Convention, which provides that recognition and enforcement may be refused if ‘[t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings *or was otherwise unable to present its case*’.<sup>89</sup> The italicized words are very close to Article IV(c) of the ICC Preliminary Draft Convention.<sup>90</sup> The final amendment to this provision was proposed by Sanders on the last day of the negotiations.<sup>91</sup> Here again, Sanders appears to have reiterated the position of the ICC.<sup>92</sup>

As a conclusion, the New York Convention illustrates how networks of experts can emerge and operate successfully at a transnational level and how top-down processes such as treaty making cannot be insulated from the outreach of transnational law. In particular, the transnational network of experts united around the ICC in the 1950s efficiently served the needs of international commercial arbitration (and those of the ICC) by promoting a new legal instrument that later became its cornerstone. The success of this network was served by its very complexity. In particular, the multi-faceted nature of the allegiances developed within the network and the overlap of public and private interests among its members channelled the positive influence of the ICC on the treaty negotiations carried out at the UN Conference. By

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<sup>87</sup> New York Convention, *supra* note 3, Art. V(1)(e): ‘The award has not yet become *binding* on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which that award was made’ (emphasis added).

<sup>88</sup> *Ibid.*, Art. V(1)(d), which indeed provided that enforcement may be refused if ‘[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, *failing such agreement*, was not in accordance with the law of the country where the arbitration took place’. The closeness of this language with the ICC Preliminary Draft Convention, *supra* note 30, is clear when considering Art. III(b) of this preliminary draft: ‘[T]he composition of the arbitral authority and the arbitral procedure shall have been in accordance with the agreement of the parties, or, *failing agreement between the parties in this respect*, in accordance with the law of the country where arbitration took place.’

<sup>89</sup> New York Convention, *supra* note 3, Art. V(1)(b) (emphasis added).

<sup>90</sup> ICC Preliminary Draft Convention, *supra* note 30, Art. IV(c) of the provided that an award should not be enforced if ‘the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to *enable him to present his case*’ (emphasis added).

<sup>91</sup> ECOSOC, *Summary Record of the Twenty-Third Meeting*, UN Doc. E/Conf.26/Sr.23, 12 September 1958, 15.

<sup>92</sup> This was noted by a UN official who attended the UN Conference, see ECOSOC, *supra* note 83, at 6: ‘This extension of the ground for refusal was actually suggested by the ICC and formally introduced by Mr. Sanders.’

uniting its members beyond traditional delimitations, this network was able to match private interests and public authority in a process where states no longer held a monopoly.